PENGKALEN HOLDINGS BHD

v.

DATO' V SIVAPARANJOTHI

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM JC
[PETITION NO: 17-8-97]
25 JULY 1997

CIVIL PROCEDURE: *Pleadings - Striking out - Grounds - No reasonable cause of action - Abuse of process - Discretionary power of court to be exercised according to justice of case - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Costs - Bill of costs - Petition for taxation - Delay in filing petition - Explanation for delay unsustainable - Legal Profession Act 1976, s. 128(1)*

The respondent filed an application to strike out the petitioner's petition that the solicitor's bill of costs of the respondent be taxed pursuant to s. 128(1) of the Legal Profession Act 1976 ('the LPA'). The application which was made pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') was based on the grounds that the petition: (i) disclosed no reasonable cause of action; and (ii) was an abuse of the process of the court.

According to the facts, the respondent was the sole proprietor of M/s V Siva & Partners, the legal firm appointed to represent the petitioner in a takeover bid and also in another action. The petitioner claimed that the bill of costs of RM960,569.50 which was submitted eight months after payment in full was made was high and expensive. Hence the petition for taxation and the instant application to strike out the petition.

Held:

[1] Striking out pleadings under O. 18 r. 19 of the RHC is a discretionary power to be exercised according to the justice of the case and such power must be sparingly exercised.

[2] According to s. 128 of the LPA, special circumstances need to be proved to the satisfaction of the court for an order of taxation to be made if six months has already expired from the date of the payment of the bill of costs. In this case, the dispute arose eight months after payment in full was made and the explanation for the delay in filing the petition and the allegation that the bill of costs was excessive was unsustainable to support the petition for taxation.

[3] The petitioner was also estopped from alleging that the bill of costs was excessive based on the fact that it was agreed in the petitioner's directors' resolution appointing the respondent that all legal fees and expenses would be paid – and such payments were made without protest or qualifications by the petitioner.

[4] Further, there was no allegation made by the petitioner of misfeasance or misconduct by the former directors in approving the bill of costs. Neither was there any opinion from experts to show that the bill was exorbitant. Therefore, the issue therefore of the bill being excessive did not arise.

[Petition dismissed.]

Cases referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 ***(refd)***

Boustead Trading Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(foll)***

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490 ***(refd)***

Muniandy Subrayan & Ors v. The Chairman and the Board Members of Koperasi Menara Maju Bhd [1997] 1 CLJ 417 ***(foll)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 ***(foll)***

Re Vernazza [1959] 2 All ER 200 ***(refd)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, s. 128(1)

Rules of the High Court 1980, O. 18 r. 19(1)

For the petitioner - Muzafar Munzir; M/s Azim, Ong & Krishnan

For the respondent - Dato' VK Lingam (W Satchithanandhan, R Thayalan & Mogan RK with him); M/s VK Lingam & Co

JUDGMENT

Nik Hashim JC:

The respondent, Dato' V. Sivaparanjothi, filed an application by way of summons-in-chambers under O. 18 r. 19 of the Rules of the High Court 1980 (the Rules) to strike out the petition of the petitioner, Pengkalen Holdings Bhd. that the solicitor's Bill of Costs No. VSP/127/96 of the respondent be taxed pursuant to s. 128(1) of the Legal Profession Act 1976 ('the Act'). The grounds of the application are that the petition discloses no reasonable cause of action (r. 19(1)(a)), scandalous, frivolous and vexatious (r. 19(1)(b)) and abuse of the process of the court (r. 19(1)(d)).

The respondent is the sole proprietor of the legal firm Messrs V. Siva & Partners. The firm was appointed on 17 May 1996 to represent the petitioner in the takeover bid by Malayan United Industries Bhd. ("MUIB") and in an action in the High Court Malaya at Kuala Lumpur (Commercial Division) Sivil Suit No. D2-22-337-96 between Loyal Design Sdn. Bhd. as plaintiff and the petitioner and six of its directors as defendants. The petitioner claimed that the Bill of Costs of RM960,569.50 comprising RM850,000 for professional fees, RM42,500 for 5% service tax and RM68,069.50 for actual and expected disbursements, was very high and excessive. Hence the petition for taxation.

In an action under O. 18 r. 19 of the Rules, it is important to take note of the often-quoted principles governing their application. Striking out pleadings under O. 18 r. 19 is a discretionary power to be exercised according to the justice of the case (*Muniandy s/o Subrayan & Ors. v. The Chairman and the Board Members of the Koperasi Menara Maju Berhad* [1997] 1 AMR 986). However, the power must be sparingly exercised (*Owen Sim Liang Khui v. Piasau Jaya Sdn. Bhd. & Anor.* [1996] 1 MLJ 113). The summary process under this rule can only be adopted when a claim on the face of it is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors. v. United Malayan Banking Corportation Bhd.* [1993] 3 MLJ 36) or bound to fail (*Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1).

In considering whether any proceedings are vexatious the court is entitled to look at affidavits as to the history of the case, and if in the light of the history the action is vexatious, the case can be struck out and the action dismissed (*Re Vernazza* [1959] 2 All ER 200; *Jamir Hassan v. Kang Min* [1992] 2 MLJ 46).

Similarly, I would apply the above-mentioned principles to the present case. Since the application to strike out the application is not limited solely on the ground under para. (a) of r. 19(1), but also on paras. (b) and (d) thereof, the court is therefore entitled to scrutinise the evidence in order to decide whether the petition is obviously unsustainable or bound to fail. Accordingly, the court will do likewise in this case. Thus, this ruling answers the petitioner's counsel earlier objection over the reference of J.B. Tan's affidavit by the respondent's counsel in support of his argument to strike out the petition.

It is pertinent to note that the petitioner had appointed the respondent as solicitor to act for them and by the Directors' Resolutions dated 23 May 1996 they have agreed to make payment to Messrs. V. Siva & Partners in respect of the legal fees or any other related expenses which may be incurred in relation thereto. Subsequent to the appointment, the respondent retained four advocates and solicitors to assist him. The first part of the Bill of RM500,000

was paid on 27 May 1996, while the balance of RM460,569.50 was paid on 26 July 1996 being the full settlement of the Bill. Two official receipts for the payments thereof were issued by the respondent. The first receipt was for "being part payment towards irrefundable fees professional and disbursements", while the second one stated for "being full settlement towards irrefundable professional fees and disbursements vide Bill No. VSP/127/96". On 16 August 1996 there was a change of Board of Directors and Managers following the takeover of the petitioner by MUIB. The petitioner's new management are of the opinion that the Bill was excessive for the work done. As the Bill was submitted to the petitioner more than six months but not exceeding one year, the petitioner, under s. 128(1) of the Act, has to show special circumstances to the satisfaction of this court to order the respondent's Bill of Costs to be taxed.

Section 128(1) states:

> After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the court.

After perusing the petition and the affidavits, I hold that there is no conflict of material evidence or of affidavits on material points in this case. There is no triable issue fit to be tried by the High Court. The resolutions appointing Messrs. V. Siva & Partners had agreed to pay all the legal fees and expenses. Full payments and settlement of the Bill were made without protest or qualification by the petitioner. The terms of the two receipts issued to the petitioner are clear and unequivocal in that the professional fees and disbursements are irrefundable, and indeed they are agreed to by the then Executive Chairman J.B. Tan. According to J.B. Tan, the sum RM960,569.50 was to be treated as a gross lump sum fee. That being so, the petitioner is estopped from alleging that the Bill is excessive (*Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331). Therefore, the question of the Bill being excessive does no more arise. Apart from saying that the petitioner's former management had failed to make careful evaluation before the Bill was paid, there was no allegation made by the petitioner of misfeasance or misconduct whatever by the former directors in approving the Bill. Neither there is any opinion from experts to say that the Bill is *prima facie* exorbitant. The petitioner must show that there is reasonable cause of action, which means under s. 128(1) of the Act, it must show special circumstances to the satisfaction of the court. The explanation for the delay in filing the petition and the allegation that the Bill was excessive as stated at paras. 9(a) to 9(e) of the petition as special circumstances, are obviously

unsustainable to support the petition; and with the presence of the undisputed evidence before the court that the Bill paid was irrefundable and agreed to by the petitioner's previous board of directors, I am of the view that the petition is bound to fail. To dispute the Bill eight months later after the unconditional payment was made in full for the services rendered by the respondent and four other lawyers, to my mind, is unconscionable. With respect, I agree with the submission of counsel for the respondent that taxation of the Bill would cause the respondent irreparable financial prejudice and detriment. I would sum up to say that this is a plain case of an able and willing client to pay for the work done by a solicitor.

In the event, I hold that the petition is scandalous, frivolous and an abuse of the process of the court as the petition discloses no reasonable cause of action whatsoever. In the circumstances, I would allow the respondent's application to strike out the petition and accordingly, I dismiss the petition with costs to be taxed.

Reported by Mariette Peters-Goh